No. 80-247

Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1979

TAMA MEAT PACKING CORP., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTION PRESENTED

Whether the Board abused its discretion in determining, without holding an evidentiary hearing, that the Union's offer during an election campaign to waive initiation fees after a collective bargaining agreement is reached was not improper.

TABLE OF CONTENTS

Page

Opinions below 1

Jurisdiction 1

Statement 1

Argument 2

Conclusion 5

Appendix 1a

TABLE OF AUTHORITIES

Cases:

Altman Camera Co. v. *NLRB*, 511 F. 2d 319 3

NLRB v. *Dunkirk Motor Inn, Inc.*, 524 F. 2d 633 3

NLRB v. *Golden Age Beverage Co.*, 415 F. 2d 26 4

NLRB v. *Griffith Oldsmobile, Inc.*, 455 F. 2d 867 4

NLRB v. *L.D. McFarland Co.*, 572 F. 2d 256, cert. denied, 439 U.S. 911 3

NLRB v. *S & S Product Engineering Services, Inc.*, 513 F. 2d 1311 3

NLRB v. *Savair Mfg. Co.*, 414 U.S. 270 ..... 2, 3

NLRB v. *Stone & Thomas*, 502 F. 2d 957 3

NLRB v. *Wabash Transformer Corp.*, 509 F. 2d 647, cert. denied, 423 U.S. 827 3

Page

Cases—Continued:

Thrift Drug v. *NLRB*, 521 F. 2d 243, cert. denied, 425 U.S. 911 3

Universal Camera Corp. v. *NLRB*, 340 U.S. 474 3

Statute and regulation:

National Labor Relations Act, 29 U.S.C. Sec. 151 *et seq.*:

Section 8(a)(1), 29 U.S.C. 158(a)(1) 2

Section 8(a)(5), 29 U.S.C. 158(a)(5) 2

29 C.F.R. 102.69(d) 4

OPINIONS BELOW

The order of the court of appeals (App. 1a-2a, *infra*) is not reported. The decision and order of the National Labor Relations Board (Pet. App. A-40 to A-52) are reported at 242 N.L.R.B. No. 43. The underlying representation decision (Pet. App. A-38 to A-39) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on June 9, 1980. The petition for a writ of certiorari was filed on August 15, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Pursuant to a representation petition filed by Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO, Local P-46 ("the Union"), the Board conducted a representation election among petitioner's production and maintenance employees, which the Union won by a vote of 94 to 59 (Pet. App. A-42).[1] Petitioner filed a timely objection to the election, alleging that the election results were invalid because the Union had made an "unlawful waiver of initiation fees" (*id.* at A-4, A-42). The objection was based solely upon the following portion of a Union flyer mailed to employees shortly before the election (*id.* at A-4 to A-5):

> Q. Will we have to pay the initiation fee after our new contract is negotiated and we accept it?
>
> A. No! Your local Union will waive the customary initiation fee for all the employees on the Employer's

[1] There were 25 challenged ballots. The challenges were not resolved because the number of disputed ballots was insufficient to affect the outcome of the election (Pet. App. A-42).

> payroll at the time your new contract is accepted by you. This is done because of the extra effort you have given in your struggle to win your NLRB election and negotiate your Union contract.

After an administrative investigation, the Board's Regional Director found no impropriety in the Union's waiver offer and therefore recommended that the objection be overruled (Pet. App. A-1 to A-6). The Board issued a Decision and Certification of Representative, rejecting petitioner's exceptions to the Regional Director's Report and ruling that no factual issues had been raised that required an evidentiary hearing (*id.* at A-38 to A-39).

Despite this certification of the Union, petitioner refused to bargain. The Board found that its refusal violated Section 8(a)(5) and (1) of the National Labor Relations Act, 29 U.S.C. 158(a)(5) and (1) (Pet. App. A-43, 48). Accordingly, the Board ordered petitioner to bargain with the Union (*id.* at A-49 to A-50). The court of appeals enforced the Board's order, finding it to be supported by "substantial evidence" and "not arbitrary or capricious" (App. 1a, *infra*).

ARGUMENT

Petitioner contends (Pet. 8-14) that the Union's offer to waive the initiation fee was improper under *NLRB* v. *Savair Mfg. Co.*, 414 U.S. 270 (1973). This contention is without merit. In *Savair*, this Court held that "permitting the union to offer to waive an initiation fee for those employees signing a recognition slip prior to the election * * * allows the union to buy endorsements and paint a false portrait of employee support during its election campaign." *Id.* at 277. The Court recognized, however, that a union has a "legitimate" interest in waiving its usual initiation fee that may properly be served by making such a waiver "available not only to those who have signed up

with the union before an election but also to those who join after the election." *Id.* at 274 n.4. The courts of appeals uniformly have held that unconditional offers to waive fees for employees currently in the workforce are not improper inducements under *Savair* and therefore do not interfere with employee free choice in representation elections. See, *e.g.*, *NLRB* v. *L.D. McFarland Co.*, 572 F. 2d 256 (9th Cir.), cert. denied, 439 U.S. 911 (1978); *NLRB* v. *Wabash Transformer Corp.*, 509 F. 2d 647, 649-650 (8th Cir.), cert. denied, 423 U.S. 827 (1975); *Altman Camera Co.* v. *NLRB*, 511 F. 2d 319, 322 (7th Cir. 1975); *NLRB* v. *S & S Product Engineering Services, Inc.*, 513 F. 2d 1311, 1312-1313 (6th Cir. 1975); *Thrift Drug* v. *NLRB*, 521 F. 2d 243, 244 (5th Cir. 1975), cert. denied, 425 U.S. 911 (1976); *NLRB* v. *Stone & Thomas*, 502 F. 2d 957, 958 (4th Cir. 1974); *NLRB* v. *Dunkirk Motor Inn, Inc.*, 524 F. 2d 663, 665 (2d Cir. 1975).

Petitioner does not dispute this legal principle. Rather, it contends that the Board, upheld by the court of appeals, incorrectly found the Union's waiver offer to be unconditional whereas, in fact, the flyer indicated that the fee would be waived only for employees who supported the Union prior to the election. This argument involves only the application of settled principles to the facts of this particular case and consequently does not warrant further review by this Court. *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 490-491 (1951).

Moreover, the Board correctly found that the waiver offer clearly applied unconditionally to all employees and therefore was proper under the *Savair* standard. Petitioner concedes (Pet. 11) that the second sentence of the offer—"[y]our local Union will waive the customary initiation fee for all employees on the employer's payroll at the time your new contract is accepted by you"—is unobjectionable. Petitioner contends (Pet. 10-13),

however, that the third sentence—"[t]his is done because of the extra effort you have given in your struggle to win your NLRB election and negotiate your Union contract"—suggests that the offer was available only to those employees who supported the Union before the election despite the clarity of the prior sentence that the offer was uniformly available to all employees on the payroll at the time of the contract ratification. There is no merit to this contention. The third sentence merely gives the reason for the promise to waive initiation fees, which was something that had already taken place, i.e., the "extra effort [the employees] have given" in the struggle to win the election and secure a collective bargaining agreement with their employer. Unlike the initiation fee waiver struck down in *Savair, supra*, the Union's announcement did not require any action on the part of the employees in order to benefit from the Union's pledge to waive initiation fees, and there is no suggestion that an employee would be treated differently depending upon whether he committed himself to the Union before or after the election. The Board's decision to this effect, based on what petitioner's expert concedes (Pet. 13) to be the literal meaning of the flyer, plainly is based upon substantial evidence.[2]

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[2]Petitioner also suggests (Pet. 14) that it was improperly deprived of an evidentiary hearing on its objections. Section 102.69(d) of the Board's Rules and Regulations, 29 C.F.R. 102.69(d), provides for a hearing when an administrative investigation reveals that "substantial and material factual issues exist." It is well settled that this qualified right to a hearing satisfies all statutory and constitutional requirements. See, *e.g., NLRB* v. *Golden Age Beverage Co.*, 415 F. 2d 26, 32-33 (5th Cir. 1969). Here, the facts relating to the offer contained in the flyer were undisputed. The controversy concerned only the correctness of the Regional Director's inferences and conclusions based on those facts. Thus the Board was clearly warranted in overruling the objection without a hearing. See, *e.g., NLRB* v. *Griffith Oldsmobile, Inc.*, 455 F. 2d 867, 868-869 (8th Cir. 1972).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 1980

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 79-1563

September Term, 1979

Filed JUN 09 1980

TAMA MEAT PACKING CORPORATION, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

Petition to Review and Cross-Application to Enforce an Order of the National Labor Relations Board.

Before: WRIGHT, Chief Judge, WALD, Circuit Judge, and MARKEY,* Chief Judge of the United States Court of Customs and Patent Appeals.

ORDER

This cause came on to be heard on the record from the National Labor Relations Board and was argued by counsel. While the issues presented occasion no need for an opinion, they have been accorded full consideration by the Court. *See* Local Rule 13(c).

This Court is of the view that the order of the National Labor Relations Board is supported by substantial evidence, is not arbitrary or capricious, and is otherwise free of reversible legal error.

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*Sitting by designation pursuant to 28 U.S.C. § 293(a) (1976).

On consideration of the foregoing, it is ORDERED and ADJUDGED by this court that the petition for review of the Board's order is hereby denied, and the Board's cross-application for enforcement of its order is hereby granted.

Per Curiam

For the Court

/s/ George A. Fisher

GEORGE A. FISHER
Clerk